Supreme Court of the United States

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IN THE

Supreme Court of the United States

October Term, 1960

No. _____

IRENE SMITH CLIETT, *Petitioner*

-against-

MAMIE SCOTT HAMMONDS, REED SCOTT, ESSIE F. SCOTT, and BERTHA SCOTT, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Irene Smith Cliett prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on January 13, 1961, in which a rehearing was denied on February 8, 1961.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit (reproduced in Appendix I) is reported at 286 F. 2d 471. The United States District

Court for the Southern District of Texas, Houston Division, wrote no opinion.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 13, 1961. That Court denied a rehearing on February 8, 1961. An order denying leave to file the second amended motion for relief from judgment under rule 60(b) was entered on February 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Is the discretion given to the Court under Rule 60(b) of the Federal Rules of Civil Procedure an arbitrary and uncontrolled discretion by which it may order final dismissal of a 60(b) relief motion without regard to the allegations in such pleading and without regard to relevant findings which trial would disclose, or is it a judicial discretion controlled and guided by law, to be exercised after a trial conducted according to the established course of a civil judicial proceeding?

2. Is old Federal Equity Rule 70 1/2, which requires separate findings of law and fact, and under which the alleged finding of partnership complained about in the instant case was made, to be construed as giving the force of an adjudication to all that may have been collaterally said, incident to an ultimate finding on another issue regardless of whether partnership was alleged or not?

3. Even if a partnership status is assumed arguendo (only), under Texas law does a partner have the right to take a part of the partnership funds and divert it to his personal account when this is done with the knowledge

and acquiescence of the other member of the assumed partnership?

4. Under Texas law; in a proceeding involving an attempt to impress a trust upon the title to real estate, is the burden of proof upon the party who holds legal title, or upon the party seeking to impress a trust?

5. Under Texas law, where a party is claiming title by adverse possession, is such adverse possession interrupted by the institution of a litigation between the parties which is not in the form of an 'adverse suit to recover the estate' as defined in Article 5514 of the Texas Revised Civil Statutes?

6. Under Texas law, where a party is claiming title by adverse possession is the question of 'recognition of the adverse title' to be decided solely upon the basis of selected recitals in an abandoned and also ambiguous pleading, in a summary judgment proceeding; or is the question of 'recognition' to be decided after a regular trial in which all relevant evidence upon the questions of recognition and adverseness is taken into account and weighed?

Rule 60(b) of the Federal Rules of Civil Procedure

Rule 60. *Relief from Judgment or Order*

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct

of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Section 57 of the Judicial Code, U.S.C. Title 28, Sec. 118, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

(Amended Rule 60 (b) became effective on March 19, 1948.)

Statement of the Case

The miscarriage of justice in this case began with the opinion of Judge SAMUEL H. SIBLEY in *Scott v. Smith*, 84 F. 2d 489 (5th Cir. 1936), and the subsequent hearing before Judge ROBERT T. ERVIN in March 1938. Judge Sibley was a resident of Atlanta, Georgia, and Judge Ervin of Mobile, Alabama. Neither was familiar with Texas land law. Judge Sibley in his opinion applied Georgia instead of Texas law to a Texas question. Judge Ervin did even

worse: he abnegated the judicial function of the trial judge. In the hearing before Judge Ervin, the petitioner, who held the legal title to the real estate in question, and her counsel, relied on Texas law as to the burden of proof, and did not make a showing of what the twenty odd witnesses that petitioner had on hand could testify to. Ever since then, and in the instant motion for relief under Rule 60(b) of the *Federal Rules of Civil Procedure*, the petitioner has been trying to correct the miscarriage of justice which then occurred.

By conveyances made prior to 1933 the petitioner became the owner of, and has the deeds and abstract to, 700 acres of land in Waller County, Texas. By findings made in 1935 it was determined that this land was purchased entirely with funds and monies belonging exclusively to petitioner. Petitioner finished making payments on one tract (to the Federal Land Bank) in 1957.

Petitioner alleges that Respondents, through a fraud upon the court, aided by accident and mistake, obtained judgments for one-half of this land in the aforesaid hearing of March 1938, but that they did not take possession until May 1960, after the filing of this present proceeding for relief from said fraudulent judgment.

This present cause of action for relief was initiated November 1958 and seeks relief from said wrongful judgments under the procedure of Rule 60(b) of the *Federal Rules of Civil Procedure*; and this petition for certiorari seeks the mandate of this Court directing that the remedial procedure established by said Rule 60(b) be observed and that the motion for relief from judgment be tried and heard as a civil action. Said 60(b) relief motion has not been tried or heard, but same was peremptorily dismissed in September 1959 under the following circumstances:

a. the decision was reached in chambers.

b. no notice that the court intended to hear or determine was previously given.

c. there was no consideration of the motion in open court and oral argument was not permitted, though it had been specifically requested in writing, whenever a motion filed by Respondent was brought up for determination.

d. there was no evidence introduced.

e. reasons for the dismissal were not given, though Petitioner has repeatedly requested "conclusions of law".

The present case is concerned essentially and primarily with Petitioner's right to have the allegations of her 60(b) relief motion duly tried and heard, rather than ultimate judgment; nevertheless an account of the prior proceedings and of the basic evidences of right to the land is necessary so that it will not be inferred that this Petitioner has no present right to complain of the peremptory dismissal of her complaint, notwithstanding the record also shows a prejudice by said trial judge.

Before narrating the facts of the case, it seems advisable to show that the Court of Appeals in the Fifth Circuit, *without a record of evidence before it, has assumed to find the facts against the allegations of the 60(b) relief motion.*

On the second page of its opinion herein the Court of Appeals declares:

> "We disagree. After a full trial and hearing the testimony of more than forty witnesses, the district court had distinctly found a partnership to exist between appellant and Scott". (Then follows a reprint of part of the 1935 trial findings).

This statement indicates that the Courts of Appeals has misunderstood these proceedings and has again been misled by the same words which were relied on to mislead the same court in 1936. By Petitioner's first ground of motion for rehearing, it was brought to the attention of said Court that it had "erred in concluding upon the merits of Appellant's cause . . . when to do so required consideration of matters outside the present record and excluded consideration of the evidence which Appellant would have produced upon a hearing. . . ." (Clerk's transcript, p. 123).

The allegations of Petitioner's First Amended 60(b) Relief Motion clearly show *three contentions regarding the assumed partnership, which is the sole predicate for the adverse judgments:*

A. The status of partnership was not legally determined in the 1935 trial because *it was not pleaded and was not in issue.*

B. It is argueable that *the 1935 Judge used the term partnership in a loose and popular sense*, approximately the same as if the word "twosome" or "joint activity" had been used.

C. That waiving the question of pleadings, and permitting consideration of all the evidence introduced (in 1935), nevertheless *the evidence does not show legal 'partnership'*, as defined in Texas law. We are prepared to show that the issue of partnership was not tried by consent in 1935 or 1938.

The affidavit of the local banker attached to the Petitioner's tendered Second Amended Motion for Relief from Judgment under Rule 60(b) (Clerk's transcript, p. 199) says *that in his opinion a partnership did not exist.*

Contention A, *the lack of pleading of partnership*, is *stated seven times* in Petitioner's 60(b) relief motion. (See motion for rehearing in Court of Appeals, Ground II. Clerk's transcript, p. 124). To quote a portion of Petitioner's 60(b) relief motion—"THESE ASSUMPTIONS OF A LEGAL 'PARTNERSHIP' ARE MADE, AS STATED, WITHOUT ANY PLEADINGS TO SUPPORT SAME, OR PROOF OF SAME BY SUBSTANTIVE EVIDENCE," (Printed Transcript, page 49, last sentence of sub. par. 2 of par. II).

Contention B, (the intent of the 1935 trial judge) is clearly set forth in Petitioner's 60(b) relief motion as follows:

> "THE ABOVE QUOTED SENTENCE, USING THE WORDS, 'IN EFFECT' SHOWS THAT THE JUDGE CONSIDERED THE RELATIONSHIP TO HAVE THE APPEARANCE OF A PARTNERSHIP BUT NOT A TRUE PARTNERSHIP IN THE TRUE LEGAL SENSE." (Printed transcript, page 45).

Contention (c) which waives the question of pleading arguendo, nonetheless asserts that evidence of true partnership is wanting, and is clearly stated by the allegations of the 60(b) relief motion and is further stated in the supporting affidavit to petitioner's 60(b) relief motion as follows:

> "I believe that a trial and investigation will show the following:
>
> "(a) Not only that the issue of partnership has never been adjudicated in a trial or hearing conducted after the issue was raised, and that Mrs. Cliett was denied the opportunity to present evidence and witnesses on

that issue, in March of 1938, but that the existing testimony in Equity No. 639, standing alone, does not support the conclusion of a commercial partnership;

"(b) That a trial of the issue of partnership or its extent, if any, was not held on March 14, 1938, and the Judge did not hear witnesses, and did not read and review the testimony on the former trial."

— — — — — —

"It has been significant to my mind, that in no brief for the Scott heirs is a single line or word of testimony, relating to the matter of partnership, or even a quasi partnership (which does not exist in Texas law), quoted or set forth for a Court to notice and read for itself. The Scott heirs' counsel relied entirely upon the wording and miscellaneous description contained in the "Findings" in the trial of Equity No. 639 in 1935, but which judicial findings were entirely in favor of Mrs. Cliett. Also, every move of the Scott heirs' counsel, after the First Appeal Opinion in 1936, was to prevent a reopening and inquiry into the status and extent, if any, of any partnership relation."

(the above supporting affidavit filed September 3, 1959, printed transcript p. 64).

In addition to the first ground for rehearing, where the above quoted specification of the error of determination of fact without a complete record was made, there are further specifications of such error stated by grounds IV, VI and XII of said motion for rehearing, and especially ground XII (Clerk's Transcript pages 126, 127, and 132-135) by which the Court of Appeals was informed that *its declaration of the fact of partnership was unauthorized and untrue.* In addition Petitioner's brief supporting said motion stated as follows:

"(c) If this Honorable Court (1961) thinks that many witnesses said a partnership existed, in the original and only trial, the Court is misinformed." (Brief in support of motion for rehearing p. 9, Clerk's transcript p. 155).

Many witnesses testified in the 1935 trial that Scott told them he had no interest in the land. This is a consideration of evidence outside of this record, but the Court of Appeals (1961) has erroneously inferred that many witnesses said a partnership existed when the record of testimony then made (1935) was not before it.

To resume a narrative of the case as previously stated, the judgment first obtained by Respondents was obtained in March 1938 at a hearing after remand made in 1936. The current Court of Appeals' opinion (Appendix page 43) shows that the original decree of June 1935 was in favor of Petitioner; and moreover that NO NEW EVIDENCE WAS INTRODUCED IN THE 1938 HEARING (Appendix, p. 43). The change in result would infer that at some point the court was induced to change opinion as to the legal effect of the evidence, yet *the 1936 remand opinion was not determinative of the rights to the land* and contains these statements to-wit:

"He and she and her young son all lived together as one household evidently all supported from the store. Scott is not shown to have had any sort of settlement of the partnership with Irene Smith. The bank's record of the entire account is in existence and in evidence and Irene Smith says she has many of the checks, but no effort is made to show any withdrawal by Scott for his own use. . . . But speculation as to intent aside, the fact is that partnership monys have been laid out in lands in the name of one partner with no claim of

a gift, and with no offsetting withdrawal by the other partner shown. . . . . There is no evidence as to the amount or disposition of the stock of merchandise in the store at Scott's death or the indebtedness of the business if any. THE DECREE RENDERED IN FAVOR OF IRENE SMITH CANNOT STAND, NOR ON THE PRESENT RECORD SHOULD THERE BE ONE FOR THE PLAINTIFFS. The lands are partnership assets, AND THE COURT OUGHT FIRST TO ASCERTAIN AND SETTLE THE AFFAIRS OF THE PARTNERSHIP. TO THIS END THE PERSONAL REPRESENTATIVE OF GEORGE SCOTT SHOULD BE MADE A PARTY. THE CASE SHOULD BE REOPENED FOR FURTHER EVIDENCE, as to the withdrawals of the partners, the debts, and the assets of the partnership besides the lands here in controversy. THE PROPER DISPOSITION OF THE LANDS MAY THEREBY BECOME MORE EVIDENT.

"Accordingly, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion." (84 F. 2d 490; Appendix p. 12.)

(Quotation is made without waiver of Petitioner's contentions regarding the erroneous conclusion of the Court that the "lands are partnership assets".)

It is repeated—NO NEW EVIDENCE IN 1938.

How Respondents induced the subsequent courts to disregard the directions of the remand order above stated is alleged, by Petitioner's 60(b) relief motion, to be a fraud upon the Courts, and to constitute circumstances that justify relief. The allegations of the said 60(b) relief motion are shown in full in the printed transcript pages 42 to 62; and with the supporting affidavits to said 60(b) relief motion shown in said printed transcript at pages 64 to 72; and with selected extracts from said 60(b) re-

lief motion being quoted in Petitioner's Motion for Rehearing before the said Courts of Appeals at pages 132 to 135 of the Clerk's Transcript. *The allegations of the said 60(b) relief motion attacking the false assumption of partnership* are summarized in the specification of error, No. II, as set out in Petitioner's brief before the Court of Appeals as follows:

> "Appellant's Amended 60(b) Motion alleges causes which justify relief under Rule 60(b) on the grounds of fraud upon the Court, accident and mistake, alleging more specifically—
>
> (a) that the decree of March 14, 1938 (which is the basic or supporting decree for Appellees) and which decree invades the title to land clearly vested in Appellant is entirely founded upon a complete fallacy or a misconception or false idea that a legal commercial partnership existed between Appellant and one George Scott, father of Appellees, and that this assumption of partnership was not pleaded or proved, in a due trial, according to law;
>
> (b) Appellant, having had a continuous possession of the land, her application is timely;
>
> (c) Appellant's right to relief is clear because her title is fully vested under recorded conveyances;
>
> (d) Prior adjudications, being based upon deceit and mistake, and upon other issues, do not bar present relief against Appellees, who are either original parties or descendants and the Court's dismissal of said 60(b) motion without a hearing is a clear error of law and a denial of Appellant's basic rights to hearing and to relief."

Notwithstanding the judgment that was obtained by Respondents through trickery and deceit in March 1938,

and affirmed, *Respondents did not attempt to take possession under said decree* and no writ of possession or for partition was requested or was issued; *and Petitioner remained in actual possession of the whole 700 acres until May 1960, until after the filing of this cause in November 1958.*

In 1941 Petitioner did file a petition in State Court (which petition Respondents have elsewhere called 'nondescript') but this 'nondescript' petition was not activated by process at all and was *entirely dormant until September 1947 when Respondents elected to answer same in the State Court.* Petitioner contends that this petition and the 1947 answer of Respondents thereto was of no consequence to interrupt or toll the adverse possession of Petitioner and *that such adverse possession was not interrupted until March 1951 when the form of action was changed by Petitioner.* The current opinion of the Court of Appeals where it says that . . . 'Within the ten-year period the appellant had sued the Scott heirs in the Texas state courts seeking reimbursement of one half of the cost of repairs, etc.' (App. p. 6) *is misleading in omitting to show that* THIS 1941 PETITION SOUGHT REIMBURSEMENT OF THE COST OF THE LAND, as well as reimbursement of the quoted items of repairs, improvements, and taxes stated in the opinion.

Petitioner, having continued in full possession of the entire property for more than ten years after the fraudulent judgment obtained by Respondents in 1938, and in 1951, *by amendment of pleading, changed the form of her action in the State Court to an action of 'Trespass to Try Title'*, (The prescribed form of action for the determination of title to real estate) and set up specially that she had matured a title by reason of ten years' adverse possession, in compliance with statutory requirements. Thereupon *Respond-*

ents obtained a removal to Federal Court on theory that a new cause of action had been asserted by Petitioner. Later Respondents obtained a judgment in denial of Petitioner's alleged title by adverse possession, *in a summary judgment hearing on briefs, on theory that allegations in the 1941 petition (the 'nondescript petition'), an abandoned pleading, were conclusive against Petitioner's right to claim title by adverse possession.* It seems apparent, or at least arguable, from the opinion of the 1952 trial judge (App. p. 14), that his ruling applied the rule applicable to a case between a fiduciary and a beneficiary because of the false recital of the partnership relation or status. Petitioner's counsel in 1952 did not plead the falsity of the 1938 decree because it was his opinion that the plea of title by adverse possession was good and would be complete and a sufficient relief to Petitioner and that it would be sustained on a regular trial; and that probably the cause would be remanded to the State Court for a trial. He was justifiably surprised at the rulings made on both the question of remand, and the refusal to grant a regular trial on the adverse possession issue.

It is Petitioner's contention that the summary procedure (a handling on briefs only, without the better communication of an open court proceeding where the law-facts which make up the case are, through assistance of adversary counsel in open court, fully spread before the consciousness of the Court) PLUS *the false recitals of the partnership status*, PLUS certain errors in Texas procedural law which were also indulged, constitute circumstances which justify relief.

The contentions of Petitioner with respect to the right to have a full trial of her claim of title by adverse possession are summarized in her specification of error No. III in her brief before the Court of Appeals, reading as follows:

"Specifications of Error No. III

"Appellant's Amended 60(b) Motion alleges an additional cause for relief, which justifies relief under Rule 60 (b), on the ground of error clearly apparent in law, in the proceedings in Cause No. 6068 in 1952, which denied Appellant a trial of her title by adverse possession; which said proceeding was clearly deflected by the false finding of partnership in the earlier decree of March 14, 1938, with the rule applicable to cases of admitted fiduciaries being wrongfully indulged in the ruling made in said case; and the failure of Appellant to have then pleaded the falsity of the partnership finding in the 1938 decree is excusable because of the unexpected ruling of the Court on a jurisdictional issue and also because said 1952 ruling was made in a summary proceeding without adequate communication between the Court and Appellant's counsel, which probably led Appellant's counsel to misconceive the basis of the Court's ruling, so that the Court was not made aware of basic facts which entitled the said Appellant to a full trial upon that issue of title by adverse possession."

The allegation of Petitioner's 60(b) relief motion which relate to the denial of a trial of her claim of title by adverse possession are shown in par. I(b) of said relief motion (printed transcript pp. 46 and 47), and Par. VI (printed transcript p. 57).

The Court of Appeals has pretermitted discussion of the 1958 injunction hearing, which is referred to on page 6 of the current opinion (App. p. 6). By par. IV of Petitioner's tendered second amended 60(b) relief motion (Clerk's transcript p. 186) the July 1958 injunction hearing is alleged to be a miscarriage, in this language, to-wit:

"As a further and alternative plea, which needs consideration only for the purpose of showing that the

decree of July 8, 1958, should not be considered for any purpose, either as an approval of the prior decrees or as indicating any new right or title in the Defendants, Plaintiff would show that her cause received no true and discerning hearing, by the Judge who conducted the said July, 1958 hearing, because his mind had been effectually blinded by a pre-trial indoctrination from a deluge of comment from the newspapers in Houston, Texas, between March and July 8, 1958. As a result of this intrusion of misleading information, said Judge was unable to fairly comprehend the case. This Plaintiff, now, also, realizes that this July, 1958 hearing was also confused by the effort which she made to represent herself without the aid of a licensed lawyer, and only the aid of her sister, who was not a licensed lawyer. Plaintiff says that this Court should, now, consider that her then frantic state of mind (in March-July, 1958) came as a direct consequence of the continuing misjudgments of her case, which resulted from the repeated impact of the original misconceptions of status and the deceits of the Defendants herein. The said July, 1958 hearing was not comprehended for the reasons aforesaid."

In view of the fact that Petitioner has repeatedly requested conclusions of law herein, (three times in the trial court before appeal and once after appeal, in the Court of Appeals, several months prior to submission and argument of the case in the Court of Appeals), it is assumed that the ruling of the Court of Appeals is based upon the reasoning stated in its opinion and that no other theory of fact and law will be indulged as supporting its ruling.

Source of Federal Jurisdiction

Federal jurisdiction is based upon diversity of citizenship.

ARGUMENT

General Statement and Outline

Petitioner's position may be better understood if the Court is initially informed that Petitioner, under Texas law, is asserting two entirely distinct and self-sufficient titles to this land:

> A. The record title - founded upon a series of law conforming written instruments or documents whereby she is considered legal successor to the earlier ownership vested in the State of Texas.
> B. Title by adverse possession -- founded upon the fact of possession and claim for more than ten (10) years in conformity to the conditions stated in Articles 5510, 5513, 5514, and 5515, of the Revised Civil Statutes of Texas.

Because of the prolixity of the proceedings, Petitioner will first state her argument in very brief, argumentative conclusions:

Petitioner is the owner of the land by consequence of having bought same, in eight (8) different formally sufficient and duly recorded deeds, extracts of which are attached to clerks transcript at pages 190-197 and having paid for same with her money. This was shown on the trial in 1935 and judgment was rendered for Petitioner as required by law in June 1935. (This should have ended the matter, the Scott heirs chief purpose in bringing the suit in 1934 was harassment of Petitioner).

After this trial Respondents, making use of a casual, possibly careless, word of collateral description in the 1935 trial court's explanatory remarks or findings, PAINTED A FALSE PICTURE INTO THE MIND OF THE APPEALS COURT IN 1936 — the idea of a partnership

relation between Petitioner and Scott, father of Respondents — and securing a reversal thereby; upon a retrial in 1938, through trickery deceit and concealment, got a judgment for half of Petitioner's land WITHOUT ALLEGING A PARTNERSHIP STATUS and WITHOUT A TRIAL OF THE ISSUE OF PARTNERSHIP and without the Trial Judge even reading the evidence previously introduced (*previously introduced before a different judge.*)

There have been court hearings of miscellaneous sorts since the erroneous reversal of 1936 but to this good day of May , 1961 — twenty-five years later—*Petitioner has never had a trial in which she has been permitted to introduce the abundant and available evidence of the falsity of the partnership idea;* nor has she been given a regular trial of her alleged title by adverse possession, possession for more than the statutory ten (10) years.

This sounds almost preposterous, but it is readily demonstrable and can be readily seen upon a full and deliberate investgation and reflection.

This "perpetuation of error", this fraud, has succeeded, (aside from and in addition to error in disregard of clear local substantive law), because of successive disregard of clearly prescribed rules of procedure, to-wit:

1. The 1936 Appeals Court did not observe the rule of
   a. REQUIRED ALLEGATION OR PLEADING OF PARTNERSHIP, to support any finding of partnership.
   b. PRESUMPTION OF REGULARITY in the 1935 trial judge's decree.
2. THE 1938 TRIAL JUDGE DID NOT READ THE EVIDENCE HIMSELF, he had not heard the case previously when all the evidence was developed. (No new evidence introduced on this hearing and Court did not allow witnesses summoned to testify.)

3. The 1938 Trial Judge did not observe the rule of REQUIRED ALLEGATION OF PARTNERSHIP, to support a finding of partnership.

4. The 1939 Appeals Court again paid no attention to rule of REQUIRED ALLEGATION OF PARTNERSHIP to support finding of partnership. (Partnership was not stipulated or tried by consent).

5. The 1952 Trial Judge ruled against Petitioner's claim of title by adverse possession IN A SUMMARY JUDGMENT PROCEEDING ONLY and the Court's mind was not informed of existing facts which should have been considered and which are proveable and which would demand a different result.

6. The 1959 Trial Judge dismissed this cause - this motion for relief from judgment under rule 60 (b) —WITHOUT A HEARING OF ANY SORT — NO EVIDENCE—NO ARGUMENT IN OPEN COURT—NO CONSIDERATION OF ALLEGATIONS OF THE PLEADING, THE 60(b) RELIEF MOTION.

7. The 1959 Trial Judge did not give his reasoning-DID NOT FILE CONCLUSIONS OF LAW, though several times requested.

8. The 1960-61 APPEALS COURT DID NOT REQUIRE CONCLUSIONS OF LAW, though special request made by Petitioner in Appeals Court several months before submission and argument of case.

9. The 1960-61 APPEALS COURT DID NOT CONSIDER ALLEGATIONS OF THE 60(b) RELIEF MOTION UNDER CONSIDERATION, and compare it with legal principle and with precedent in other cases and declare upon the sufficiency of said allegations to merit relief, assuming said allegations to be true; BUT SAID APPEALS COURT MERE-DENIED THAT THE ALLEGATIONS WERE

TRUE, WHEN THIS HAD NOT BEEN FOUND BY THE TRIAL COURT, AND THERE WAS NO EVIDENCE IN THE RECORD THAT SAID ALLEGATIONS WERE UNTRUE, THE RECORD SHOWING THAT THE SAID 60(b) RELIEF MOTION WAS DISMISSED WITHOUT HEARING OF EVIDENCE.

Had there been a more deliberate consideration given this cause, upon any one or more of the pivotal points, the fraud of Respondents would not have succeeded. Had due procedure been observed, the false concept—the fraud—would have never taken root in the mind of the 1956 Appeals Court. Had a greater deliberation been observed the court would have found that local law - the law of Texas partnership activity - required a decree for Petitioner regardless of whether a partnership between her and Scott, on other property, existed or not.

Speaking through the American Bar Association Journal in a recent issue, Justice Musmanno (of Pennsylvania) said "Mr. R. . fails to tell how the . . case began. Without that indispensable preliminary it is impossible to obtain an understanding perspective of the whole tragic affairs." This basic reasoning is behind the rule which require a trial before judgment. *Knowing how the case began is an indispenseable preliminary to an understanding perspective of the whole case.*

Neither Trial Judge nor Appeals Court herein has ever permitted Petitioner to tell how the basic case began. Possibly the Trial Judge (1959) felt that his knowledge was sufficient because he is the same trial judge who conducted the 1958 injunction hearing in the concluding days of the "Eneri Episode." Petitioner believes that *the misformation*

thus obtained by the Trial Judge who dismissed this 60(b) relief motion without a hearing *is how this cause* (*the appeal from said dismissal order*) *began.* This July 1958 hearing is the one in which Petitioner, without aid of counsel, attempted to represent herself but this hearing was so inflamed and intruded upon by newspaper publicity calling Petitioner the "Rulei of Eneri" and other names, that such hearing was a miscarriage, as alleged in paragraph IV of Petitioner's tendered Second Amended Motion for Relief from Judgment under Rule 60(b), Clerk's Transcript pg. 186 previously quoted pg. 16-17 herein. This injunction hearing was upon different pleadings and since this 60(b) relief motion in the District Court was on file when the injunction cause was reached in the Court of Appeals in May, 1959 same was affirmed without opinion 265 F 2d 933, Appendix pg. 24. The present Court of Appeals has pretermitted consideration of said order of July 1958 and accordingly it is given no further attention herein.

The remaining pages of Petitioner's argument are addressed to the specific errors which constitute the miscarriage. Our first point is that the Court of Appeals has made an error of intolerable magnitude in determining the facts against Petitioner when such a finding should only be made in the trial court with a full record of evidence. The second point is that the Court of Appeals and Trial Court should have considered Petitioner's pleading—her 60(b) relief motion—construing its allegations favorably to Petitioner, and should have determined its sufficiency to merit a hearing; the remaining points are complemental to the foregoing and constitute the several reasons why Petitioner is entitled to relief, namely:

(a) Failure to Plead Partnership prevents its indulgence as a predicate of action supporting the judgments for Respondents; (b) a judgment obtained through trickery and deceit, which deprived Petitioner of an orderly trial and opportunity to present witnesses who know that a partnership did not exist in fact, can be relieved in a direct attack proceeding such as Rule 60(b) motion for relief from judgment; (c) a judgment by a judge who did not read the evidence for himself can also so be relieved; (d) a complete error of local law, a complete disregard of such local law can also be relieved and these errors of local law are each pivotal or wholly determinative.

Because this case has been drawn out into such a series of repeated false judgments and *the apparently required untying of each tangle of error* may present the picture of such an arduous intellectual task that the Court may feel tempted to regard the idea of res judicata as a handy label which can be applied to an unwanted job, we remind the Court that this task is not more arduous than any other trial court proceeding, and that Justice is not to be measured by the number of mistrials that have occurred but by the verity and regard for fact and law which is displayed by the record; and that it is only when issues have been truly tried and adjudicated that the case can be marked—res judicata.

Reasons For Granting The Writ

I.

The Court of Appeals for the Fifth Circuit in affirming the arbitrary dismissal of Petitioner's motion under Rule 60(b) of the Federal Rules of Civil Procedure decided a Federal question in a way in conflict with applicable decisions of this Court.

There being no record of evidence before the Court of Appeals it has violated the established course of judicial proceedings in finding or holding that "partnership had been distinctly found by the district court in 1935", when the 60(b) motion repeatedly alleges that (1) partnership had not been pleaded in 1935 (or 1938), and (2) the evidence does not support a finding of partnership, and (3) that the original Trial Judge had not intended a judicial finding of partnership.

In making such finding notwithstanding the allegations of the 60(b) relief motion which are emphatically to the contrary, when the trial judge had no evidence before it and made no conclusions of law, the Court of Appeals exceeded its jurisdiction and authority.

In *Schilling v. Schwitzer-Cummins Co.*, 142 F. 2d 82 (D.C. Cir. 1944), the Court said:

> " . . . if adequate findings had not been made, the proper procedure would be to remand the case to the trial court and direct that new findings be made. It is not the function of an appellate court to assume the powers of the trial court; which it would do, necessarily, if it tried, de novo, such a case as the present." (at 83)

Where the only record before the court is the pleading dismissed, the only function of the Court of Appeals is to determine the sufficiency of the pleading to state a case, to allege facts and occurrences which, if proven true on trial, will merit relief of the law. In *Armour & Co. v. Alton R. Co.*, 312 U.S. 195, Mr. Justice Black writing for the Court said:

> "Since the cause was dismissed without evidence or answer, it is on the basis of the allegations of the

complaint that we must apply the controlling law." at 197.

Clearly the Court of Appeals herein should have considered the allegations of the complaint here—the 60(b) relief motion—and given opinion as to whether said pleading stated a cause of action for relief. Acting under the assumption that the Court of Appeals would so proceed, especially since there was no evidence introduced and no conclusions of law given by the trial judge, Petitioner, in her brief before the Court of Appeals (a brief of 85 pages plus a 7 page appendix) endeavored to analyze the situation from all reasonably foreseeable points of view, as illustrated by the index of said brief, which is attached as appendix pages 70-73.

Clearly the Court of Appeals has departed from the prescribed and customary course of judicial proceedings, in making a finding of fact without any record of informative evidence before it, and in failing to declare the law as to the case made by the pleading.

The Trial Court refused to permit argument, refused to grant a hearing in open court, heard no evidence, and, so far as Petitioner's information or that of her counsel is concerned, the Court did not even read this 60(b) motion for relief before it was dismissed. An opinion was not filed and no conclusions of law were filed, though several times requested in trial court; and again in the Court of Appeals several months before submission.

Prior to the enactment of Rule 60(b) of the Federal Rules of Civil Procedure, a number of remedies at common law, as well as in equity, were available for relief to parties aggrieved by judgments obtained under—(a) circumstances limiting or denying the aggrieved party's

right to defend, or (b) resulting from unilateral or mutual mistakes misconceptions concerning the issues joined; or (c) which were imposed upon the Court through fraud or other cause in such manner as to subvert or impede the proper functioning of the judicial process; or (d) which otherwise purported to conclude issues which were never truly the subject of an adversary proceeding. Amended Rule 60(b) was created to encompass and give clarity to each of said prior remedies, whether the remedy formerly was urged in an independent action or in the form of a motion in the proceeding out of which the decree being attacked arose. So the proceeding below under Rule 60(b) may be characterized as a direct attack urging new matter foreign to the records previously made, as well as relying upon errors which are apparent from previous records, and such proceeding is a combination of equitable and legal causes of action, some of which but for convenience well might have been independently urged and required the intervention of a jury if requested.

The scope of Rule 60(b) is clarified by its last two sentences. According to *Klapprott v. United States*, 335 U.S. 601 (1949), 336 U.S. 942 (1949), the power of a court under this Rule, when such power is invoked by motion, is as great as the power of a court when invoked by an independent action.

This view is also shown in Moore's Federal Procedure, Vol. 7, pg. 623 where it is said:

> ". . . and hence, disregarding nomenclature, the Court, unless a party would be adversely affected, may treat a motion as the institution of an independent action, and independent action as a motion for relief."

Since the motion under Rule 60(b) is in lieu of the remedial proceedures of bill of review, bills in the nature of a bill of review, audita querela, coram nobis, and coram vobis, which permitted or required an investigation of both the past record and matters outside the record, after the manner of a suit in Equity, it follows that after the filing of the relief motion, the procedure under Rule 60 (b) now contemplates a trial and investigation as under the rules of an ordinary civil action. This is the rule of procedure indicated by the rule itself and by a considerable number of cases in which the rule has been followed. A clear and emphatic recognition of this *right to present pleadings and evidence*, under the Rule 60(b) procedure is made in the case of *Federal Deposit Insurance Corporation v. Alker* 234 F. 2d 113 (3d. Cir. 1956). In that case the trial judge had heard the motion for relief argued but did not require formal proofs to be made before he granted the motion. The case was again appealed to the Court of Appeals and on this occasion it laid down a very specific procedure as follows.

> "issues were those raised by the motion and answer which Judge Welsh was required to resolve by receiving evidence and *making full finding with respect to the facts alleged in Defendant's motion, including the nature of the testimony which the proffered witnesses will give at a new trial, if granted, and by stating his conclusions of law. . . . .*".

This decision accords with the literal import of Rules 52 (2) and 41(b) of the Federal Rules of Civil Procedure, when the rules are read together as intended. The rationale of the decision just stated is especially applicable to this

cause because the order of the trial court here purports to dismiss Petitioner's 60(b) relief motion upon its merits.

The record did not disclose to Petitioner:

(1) Whether the Trial Court has dismissed her motion for relief, because of some ground urged in a motion of Respondents or upon the court's own motion;

(2) Whether or not the motion was dismissed because of some insufficiency of pleading which Petitioner might have cured if she had been informed of the nature thereof.

For these reasons Petitioner was at a loss as to the manner in which this appeal should be briefed and presented.

When the Court of Appeals affirmed upon the grounds stated in its opinion - that it conceived a partnership status to have been found by the 1935 trial - it showed, for the first time in this sequence, a course of reasoning which was being followed by the Court. It does not help Petitioner, however, for the Court to be misled again as to the facts but it is some said to know the cause of the present judgment because Petitioner can direct attention to the record which shows that the fact assumed is alleged to be untrue. Her problem is to obtain a hearing, so that proof can be made. Clearly Petitioner is entitled to a hearing of her 60(b) relief motion which alleges that such assumed fact, the entire ground of the judgment, is false, is untrue; that it has not been judicially determined in the earlier proceeding; and that its indulgence was the result of the artifice and deceit and a fraud upon the Courts. In *United States v. Morgan*, 346 U. S. 502 (1954) it was said. ... ". . . this motion in the nature of the extraordinary writ of *coram nobis* must be heard by the

federal trial court. Otherwise a wrong may stand uncorrected which the available remedy would right" (@ 512). As previously stated, the 60(b) relief motion is now the available remedy to be pursued.

In Federal Practise and Procedure, Barron & Holtzhoff, Rules Edition Vol. 3, page 436, Section 1332, (relating to Rule 60(b)) it is stated:

> "An appellate court may, perhaps, not know whether the requirement for reopening a case under the rule are met until there has been a full record devloped. Such record can only be made in the trial court. Of course the district judge is not free to flout the decision of the appellate court so far as it goes, but he should be free to consider whether circumstances not previously known to either court compel a new trial."

II.

The Court of Appeals for the Fifth Circuit in giving binding force to an alleged finding of partnership under old Federal Equity Rule 70½ in a proceeding in which partnership was not alleged, decided a Federal question in a way in conflict with applicable decisions of this Court.

It is several times stated by Petitioner's 60(b) relief motion that PARTNERSHIP WAS NEVER ALLEGED by Respondents in 1935 or 1938. Under the Federal Equity Rules in effect when the 1935 findings were made, it is held that a judgment cannot be rendered without pleadings of the grounds for judgment, *that allegata and probata must correspond.* See Hughes Federal Practice, Jurisdiction and Procedure, Vol. 7, Page 112, Sec. 4273 where it is

stated - "As in law, so in Equity, the allegata and the probata must correspond." Many decisions are cited.

Consequently when Equity Rule 70½ was adopted in 1930, for the purpose of requiring the District Court in Equity cases to give the reasons for the decree, it did not do away with the existing rules which have ever required a clear pleading of a particular ground for relief in order that it be made the basis for a finding or a judgment. In *Crockett v. Lee*, 20 U.S. (7 Wheat.) 522 (1822), Chief Justice Marshall said:

> ". . . if a new case might be made out in proof, differing from that stated in the pleadings, all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place." At 527.

In *Hartford-Empire Co. v. Shawkee Mfg.*, 147 F. 2d 532 (3d Cir. 1944), Judge Maris said for the Court:

> "Findings of fact are not to be made in vacuo but only in connection with an issue of fact which is before the court for adjudication. . . .
>
> "Only in the light of the issues raised by pleadings can intelligent application of the relevant legal rules be made." At 535, 536.

In this cause partnership was never pleaded, neither in 1935 nor in 1938.

It must be kept in mind that the 1935 Judge (Kennerly) who mentioned *partnership* in the 1935 findings, *when the issue of partnership was not before the court*, was not the Trial Judge of 1938 (Erwin) who was persuaded to declare the lands as partnership assets belonging

one-half to heirs of Scott, as a result of the hoax worked by the Scott heirs. This Judge (Erwin) did not try the issue of partnership and did not even read the testimony in the old record, much less hear any of the twenty odd witnesses who were present to give evidence, but who were not permitted to testify.

By Petitioner's 60(b) Relief Motion, it is alleged in paragraph III . . . "In fact this Plaintiff had witnesses by the dozen sitting in the Courthouse in March 1938, to fully develop the matter, but which development could not be made because the Trial Judge had been persuaded to the idea that the issue was already determined" (Printed transcript page 53).

By paragraph VI of Petitioner's 60(b) Relief Motion, it is stated:

> "This Plaintiff's property has been decreed away from her and granted to the Scott heirs WITHOUT GIVING HER A FULL HEARING AND OPPORTUNITY TO PRESENT WITNESSES, who are available and who have testified or given affidavit to the effect that there was not any equal partnership existing between her and Scott." Printed Transcript Pg. 58). (Emphasis supplied here.)

It cannot be denied that Petitioner's 60(b) Relief Motion, which has not been tried, raises the issue that the sole predicate of action supporting the decrees for the Scott heirs - the existence of a partnership relation - has not been tried, and that the assumption of such a status is probably false, and that this assumption was made through a fraud upon the Courts. In paragraph IV of Petitioner's 60(b) Relief Motion it is said that the hoax

which was perpetrated has "been principally the result of the artifice and deceit which was utilized by the Scott heirs to bring about the pseudo finding of partnership . . ." (Printed transcript, pg. 55).

Very obviously this case represents "the injustice which must frequently take place" as said by Marshall, when findings were made without antecedent pleadings to bring the issue to notice and contest.

In *Ensminger v. Powers*, 108 U.S. 292 (1882), there was a bill of review to correct a prior decree of title to land, and though the error committed by the lower court is not precisely the same as in the case now involved, the terminal result is substantially the same, and we believe that comment of the Supreme Court in the *Ensminger* case is applicable to the actions taken in this cause.

In the *Ensminger* case the Court said:

> What, then, does it show, except that the proper forms of the administration of justice were disregarded, the functions of the judge were abnegated, there was no hearing or decision by the court, and the counsel for the defendant was allowed to prepare and enter such a degree as he chose? Words need not be multiplied to argue that a decree rendered under such circumstances must, on a bill of review, be held for naught and as if it did not exist. Though not the case of actual fraud practiced on the court or on the opposite party, what was done operated as a legal fraud in respect of the rights of such party, through the illegal co-operation of the judge with one of the parties. In *McVeigh v. United States*, 11 Wall 259, an information had been filed by the United States against certain property belonging to McVeigh, to forfeit it. He appeared and put in a claim and answer. The district court struck it out because McVeigh

> resided within the Confederate lines and was a rebel, and condemned the property by default. This court, on a writ of error, reversed the judgment, on the ground that McVeigh was denied a hearing and the first principles of the due administration of justice were violated. Equally in the present case, the plaintiffs in this suit were denied a hearing, and their answer might as well have been stricken out. In addition to this, there was no judicial action by the court, and the defendant was allowed virtually to decide in cause in his own favor. For these reasons it must be held, that the decree in question cannot, in this suit, be regarded as a decree adjudicating any rights between the parties to the former suit, and that it forms no obstacle to the consideration of the issues raised in the present suit, provided the bill was filed in time, as a bill of review. At 301-2.

It is to be kept constantly in mind that the decree entered in 1938 was not entered by the Trial Judge of 1935, but by a judge who was not a native of Texas, but was a resident of Mobile, Alabama. *Also keep in mind that the original decree, following a full trial was for Petitioner;* the 1936 Appeals Court, though *'adopting Georgia law'* as reasons for reversal, (as will be later pointed out), would yet not, on the record presented, enter a decree for Respondents, but remanded the case, calling for more evidence. Yet *Respondents,* as a part of their trickery, *deliberately waived further evidence and submitted the former transcript of evidence,* to the judge who was not familiar with such evidence. HE WAS THEN INDUCED NOT TO READ THE EVIDENCE. Is this not the 'abnegation" of the judicial function by said Trial Judge? There is no command, in the 1936 opinion of the Court of Appeals, that upon retrial Petitioner (Mrs. Cliett) *shall*

present more evidence. Under the clearest rules of Texas law, [see *Hengy v. Hengy*, 151 S.W. 1127 (Tex. Civ. App. 1912], *the burden of proof was on Respondents (Scott heirs) and these parties waived further evidence;* yet when the cause is now appealed the second time, upon the same record, a decree for Respondents is affirmed *upon a theory stated, for the first time,* that Petitioner as a "surviving partner" was under the duty of making a further accounting and which she had declined to do. *Why was this ruling left out of the first opinion???* As set forth in Petitioner's 60(b) motion now under consideration, Petitioner then, in 1938, had many witnesses who could have testified about the alleged partnership issue but they were not called because of the craft and deceit of Respondents in obtaining a closing of the case on the old record and *before,*

> (let it be remembered that our reconstruction must credit or charge the parties with only that knowledge which they had at that time and when they were going in the direction then impelled by those circumstances).

It was known to Petitioner that the Trial Judge of 1938 was not going to thoroughly review and analyze the testimony in the record; and *before* it was known to Petitioner that the Court of Appeals was going to declare that Petitioner had a burden of proof, which is not declared by Texas law. The doctrine of entrapment is usually referred to in criminal cases; but it is believed that Petitioner and her counsel were clearly trapped or tricked in March 1938. The Court can now more readily see the applicability of the statements made in the *Ensminger* case:

—"What then, does it show, except that the proper forms for the administration of justice were disregarded, the functions of the judge were abnegated. . .

The 1938 Judge *did not read the evidence;* he made *no effort to ascertain* the affairs of the partnership 'and the court ought first ascertain and settle the affairs of the partnership' . . . . The proper disposition of the lands may thereby become more evident' (Quotation of opinion 84 F. 2d 490).

The word 'ascertain" has a very clear meaning; "to find out or learn for a certainty". How could any judge 'find out or learn for a certainty' what a partnership was or what its affairs were, without reading the evidence in which it was allegedly described? As said by Bacon - fraud is the more pernicious the less it is seen. Respondents knew there was no substantial evidence of partnership so they had to work a hoax - the inducement of an idea which is false - so they persuaded the Court not to read - not to ascertain.

III.

The Court of Appeals for the Fifth Circuit in failing to hold that under Texas law a partner has a right to take a part of the partnership funds and divert it to his personal account when this is done with the knowledge and acquiescence of the other member of the alleged partnership, decided an important state question in a way in conflict with applicable state law.

IV.

The Court of Appeals for the Fifth Circuit in failing to place the burden of proof on the Respondents rather than on the Petitioner, the holder of legal title to the real estate in question, decided an important state question in a way in conflict with applicable state law.

(discussed together)

The energy of *the idea of a partnership status* (though a falsely gotten motive force) was a sufficient energy to move the mind of the Circuit Court to a reasoning which disregarded the finding of the 1935 Trial Judge and substitute a reasoning which terminated in the conclusion—

> "BUT speculation as to intent aside, the fact is that partnership moneys have been laid out into the lands in the name of one partner with no claim of a gift and with no offsetting withdrawal by the other partner shown. We think equity can do no other than treat the partner who holds title as a trustee for the partnership. — The lands are partnership assets, etc." (App. pg. 52).

NO AUTHORITY IS CITED TO SUSTAIN THIS REASONING.

The Author of this opinion was Judge Samuel H. Sibley, a native and resident of the State of Georgia. Had the Court of Appeals followed the rule of judicial processing which directs that the ruling of the Trial Court on matters of local law be affirmed unless clearly erroneous, and paused sufficiently to look for precedent in the law of Texas, this period of more than twenty years of harassment of Petitioner would not have had its commencement, but

the Court would have found Texas law to require an affirmance of the decree for Petitioner. In order that this will be apparent, let it be kept in mind, as previously stated, that *but one record of evidence of the substantive rights of the parties has ever been made;* that the facts as recited by paragraph 6(f) are unchanged and it is (was then and is now) the undisputed fact that:

I. The deeds, the muniments of title, place the ownership in Petitioner without any shadow of doubt.

II. The funds taken from the bank account to pay for the land were less than half of half of the fund deposited to said account, (were less than 25%) and no effort was made by the Respondents to show what other disposition of funds had been made. *Respondents clearly waived all demand for an accounting.*

III. Scott's knowledge and acquiesence in these purchases is positively proven.

Under Texas law, which permits one assumed partner to buy individual property with partnership funds so long as it is done with the knowledge and consent of the other assumed partner, the undisputed facts above recited require that the deeds, the muniments of title be respected. In *Hengy v. Hengy*, 151 S.W. 1127, (Tex. Civ. App. 1912), the Court said:

> "The legal title being in defendant, *the Court was correct in placing the burden of proof on plaintiff* to ingraft a trust upon such title." . . . "You will therefore find by your verdict that his lot is the individual property of the defendant, Louis Hengey, unless you believe from the evidence that at the time of the purchase of said lot by defendant he bought it for

> the partnership of F. J. Hengey and son" . . *'the charge announces the correct rule if a partner purchases property for himself with partnership funds with the knowledge and consent of his partner*, but a different rule applies where he acts in bad faith and uses the fund money without the knowledge and conset of his partner' ". (Emphasis supplied).

The *Hengy case*, as indicated, shows both where the burden of proof lies and the substantive law of Texas. THE BURDEN OF PROOF lay on Respondents when the cause was remanded and there is not a line in the opinion of Court of Appeals opinion in 84 F. 2d 489-490 (App. [illegible]) which in anywise attempts to place the burden of proof on Mrs. Cliett (Smith in that opinion). The idea that the burden lay on Mrs. Cliett, as an alleged surviving partner, was stated in a RETROACTIVE MANNER, by the opinion of the Circuit Court reported in 102 F. 2d 725. The laws are required to operate prospectively or they will cease to deserve the designation of law, meaning a rule or a guide for action.

See also *Lee v. Wysong*, 128 Fed. 833 (5th Cir. 1904), relating to Texas land.

The disregard of local law, which is reflected by the rulings made in this cause should be along with other circumstances a ground which justifies relief under Rule 60(b). As brought out in Petitioner's (Appellant's) brief on Motion for Rehearing before the Court of Appeals the reasoning of the Circuit Court, as reflected by its opinion in 84 F. 2d 489 and appears to be entirely directed and guided by the Georgia Code provisions and rules of decision thereunder. It is a fundamental rule that title to land is fixed by the law of the state where the land

is situated and if these rules are not observed, there will be a great disturbance of citizens everywhere. The disregard of Texas law and the application of Georgia law to determine the title to Texas land should surely be relieved.

Moreover, the burden of proof being changed from the Respondents, as it is under the *Hengy* case, to Petitioner under the retroactive ruling made in 102 F. 2d 725, which was made under the assumption (a false assumption) of a partnership status, with Mrs. Smith (Cliett) as surviving partner, again emphasises the vicious trickery which Respondents worked - REFUSING TO PLEAD PARTNERSHIP, and the other deceits and concealments which were used.

V.

The Court of Appeals, Fifth Circuit, in declaring that a litigation between persons, not in the form of "an adverse suit to recover the estate" as defined in Texas Revised Civil Statutes, Article 5514, as being sufficient of itself to toll or interrupt the actual adverse possession of the party in possession, is a clear misstatement of the land law of Texas.

VI.

Under Texas law where a party is claiming title by adverse possession, the question of "recognition" of the adverse title claim, is not confined to isolated acts of the party in possession, but all of the relevant evidence on the question of recognition should be considered and the ruling of the Court of Appeals,

Fifth Circuit, which has denied the adverse possession claimant a regular trial and opportunity to present all relevant evidence of a continuing and hostile claim to the land, constitute a serious denial or misapplication of the land law of Texas.

(Discussed together)

The Court of Appeals, in declaring that the filing of the suit in the State Court in 1941, to which the Scott heirs answered in 1947, had "conclusively tolled the ten-year limitation period (Appendix p. 47) has misstated Texas law because said State Court case, in 1941, and until 1951, was not a "suit to recover the estate" as defined by Article 5514 of the Texas Statutes. The decisions cited by the Court of Appeals have no application whatever to the problem at hand because said decisions were made in litigations in the form of trespass to try title, a special form of action for determination of the title to land in Texas and which is a "suit to recover the estate" as defined in Article 5514. The earlier opinions of the District Court in 1952 (Appendix p. 55), and of the Court of Appeals in 1956 (Appendix p. 64), do not take the same position as is taken by the Court of Appeals in 1961. These earlier opinions of 1952 and 1956 each declare *that the amendment of the petition* in the State Court case in 1951 *set up an entirely new case—a removable cause of action.* The case of *Deaton v. Rush*, 113 Tex. 176, 252 S.W. 1025 (Supreme Court of Texas, 1923), illustrates the distinction between the suit which *pertains to* real estate and one of which is *to recover* real estate.

It appears that petitioner's counsel in 1952 felt that, under the rule announced in *Portis v. Hill*, 3 Tex. 273,

and *Cuniff v. Bernard*, 94 S.W. 2d 577 (Tex. Civ. App. 1936) (which cases both relate to the action of trespass to try title in Texas and involve the issue of title by adverse possession), he was not required to file affidavits of evidence. Both of the above cases declare that the adverse possessor is not required to plead his evidence but that a plea of title by adverse possession carries a negation of recognition, under which the possessor can introduce evidence in rebuttal of recognition without further pleading. Had petitioner's counsel been informed that it was his duty to file affidavits of his evidence, he could have done so and such would have shown the actual hostile words, actual notice of hostile claim, in addition to the fact of possession. (See supporting affidavits to Petitioner's 60(b) relief motion, printed transcript pages 70-71.) Had the hostile words been shown to the Court in 1952, it seems entirely arguable that a different ruling would have then been made, because the opinion of the District Judge in 1952 shows that it is considered that the recited relationship of the parties, as reflected by the recitals of the 1952 opinion, required more than a mere possession in order to set the statute in operation. The case of *Cuniff v. Bernard*, above cited, and *Meaders v. Moore*, 132 S.W. 2d 256 (Tex. Comm. App. 1939), each show that *recognition*, as a defense to a claim of adverse possession, *is an ultimate question*, usually *for the jury to decide*, and is not to be resolved from a consideration of one particular act but by a consideration of all the acts and the real relationship of the parties. If necessary to her protection, Petitioner is seeking a regular trial of the limitation issue, where all relevant evidence may be heard and weighed; this did not occur on the summary judgment hearing in 1952.

Conclusion

Questions of title relating to Texas land should be decided (1) according to Texas law, (2) after a full hearing, (3) in a proceeding in which the pleadings and the proof correspond. All three vital elements are missing in this case, contrary to decisions of the United States Supreme Court and decisions of the state courts of Texas. The result is a miscarriage of justice which should be rectified by granting the instant petition for a writ of certiorari.

Respectfully submitted,

SAM R. FISHER
814 Esperson Bldg
Houston 2, Texas

RAYMOND HILL
C. & I. Life Bldg.
Houston 2, Texas

O. JOHN ROGGE
401 Broadway
New York 13, N.Y.
Attorneys for Petitioner,
Irene S. Clett

Certificate of Service

I, an attorney for Petitioner as aforesaid, do hereby certify that I have on this the_____day of May, 1961, duly mailed a copy of this Petition for Certiorari (as printed) to each of the hereinafter listed attorneys for Respondents, at the addresses so shown:

W. H. Betts, Attorney at Law,
P. O. Box 536
Hempstead, Texas

George L. McGhee, Attorney at Law,
927 Bank of Southwest Bldg.
Houston 2, Texas

Such mailing being in conformity to law and the requirements of Rule 33 of the Supreme Court.

Raymond Hill
C. & I. Life Bldg.
Houston, Texas

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18389

IRENE SMITH CLIETT,

Appellant,

versus

MAMIE S. HAMMONDS, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(January 13, 1961.)

Before TUTTLE, Chief Judge, and RIVES and JONES, Circuit Judges.

RIVES, Circuit Judge: This appeal is from an order dismissing appellant's motion for relief from judgment, filed under Rule 60(b), Federal Rules of Civil Procedure. The judgment sought to be vacated was affirmed by this Court in 1939, *Cliett v. Scott*, 5 Cir., 1939, 102 F. 2d 725. The motion proceeded upon the theory that the judgment and this Court's affirmance were induced by deceit and fraud in misleading both the district court and this Court to hold that a partnership had been found to exist between appellant and George Scott, father of appellees, when that fact had not actually been found

by the district court originally upon the trial on the merits. We disagree. After a full trial and hearing the testimony of more than forty witnesses, the district court had distinctly found a partnership to exist between appellant and Scott. We quote a portion of the findings of fact of the district court:

> " . . . . I find, however, that no funds, money or property which either Scott and Defendant had (if they had any), at or prior to the time they moved on the 50 acres, went into or was used to purchase the land involved in this suit, and that, up to 1926, neither of them had accumulated any other money or property.
>
> "6:—'(a) In 1926, Scott and Defendant *in effect formed a partnership* to, and together did, build a store house on the 50 acres of land, and together, and as partners, ran and operated a store thereon, until Scott's death in 1933. They bought and sold many kinds of goods, wares and merchandise to the farmers and others of the community, and bought and sold country produce, poultry, eggs, cotton, hides, vegetables, etc. The *partnership* owned the store building and fixtures, the stock of goods, certain trucks, automobiles, etc.
>
> '(b) The *partnership* funds were kept on deposit in the Guaranty Bond State Bank at Waller, Texas, in the name of Scott, but subject to the check of both Scott and Defendant, and both Scott and Defendant, from time to time, drew checks thereon.
>
> '(c) The interest of each (Scott and Defendant) in the *partnership* business and assets is not clearly shown by the evidence. Considering the unusual activities of Defendant from 1928 to 1933 (about which most witnesses agree), and the inactivity of Scott (due to his age and bad health) during such period, I find that Defendant's interest was at least 50% and probably much greater.

'(d) The *partnership* agreement and activities did not extend beyond such operation of the store but Scott and Defendant were each individually, and each for themselves, buying, raising and selling cattle. The evidence does not enable me to find what particular cattle, and how many, each owned. The cattle bought by cash were paid for out of funds withdrawn from the partnership, being the funds which they were each, from time to time, entitled to draw and receive out of and from the partnership. For convenience, they are called Dividends. In other words each invested their Dividends from the partnership from time to time in cattle. Each, however, deposited in the partnership account in the Bank funds earned and realized from such trafficking in cattle.

'(e) Scott individually seems to have had some financial activities other than cattle. These were on his own account, and not on *partnership* account. Defendant likewise had individually, and on her own account, other financial activities, the chief one being the purchase and acquisitions by her, from time to time, during the years 1927, 1928, 1929, 1930, 1931, and 1932, of the lands involved in this suit.

'(f) The lands involved in this suit were not purchased with funds or monies belonging in any manner to Scott, nor with funds or monies belonging to Scott's wife, one of the Plaintiff's herein, nor with funds or monies belonging to the partnership. They were purchased entirely with funds and monies belonging exclusively to Defendant, to which she was entitled, and which she received (with Scott's full knowledge and approval) as Dividends owing and due her and coming to her from the partnership and her earnings in her activities in cattle. Such lands were not purchased in trust for Scott, nor was he in any manner whatever interested, nor did he have or claim to have any interest, therein.'" (Emphasis supplied.)

The district court's judgment[1] in favor of appellant was reversed by this Court in 1936. *Scott v. Smith*, 84 F. 2d 489. This Court's opinion concluded as follows:

> "The decree rendered in favor of Irene Smith cannot stand, nor on the present record should there be one for the plaintiffs. The lands are partnership assets, and the court ought first to ascertain and settle the affairs of the partnership. To this end the personal representative of George Scott should be made a party. The case should be reopened for further evidence as to the withdrawals of the partners, the debts, and the assets of the partnership besides the lands here in controversy. The proper disposition of the lands may thereby become more evident.
>
> "Accordingly, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion." (84 F. 2d at p. 490.)

Upon remand, Judge Kennerly overruled a motion to strike an affirmative defense, as follows:

> " . . . that if the business relationship between her and George Scott constituted a partnership, which is not admitted but denied, then she alleges that it was agreed and understood between George Scott and respondent before said business dealings were commenced and throughout the continuance thereof that George Scott should have an interest therein to the extent only of a living out of such business as long as he lived."

Nevertheless, the case was again submitted to the district court with no evidence to support that affirmative

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[1] Appellant has been successful in the Texas state courts in impressing a trust upon another 50 acres of land, which had been conveyed to Scott. *Scott v. Chett*, Civ. App. Tex., 1948, 212 S.W. 2d 562.

defense, and, indeed, upon the same evidence that was introduced upon the first trial. The judgment complained of was then rendered, and properly so.

Subsequently, the district court found against the appellant on her claim of ten years adverse possession after the date of judgment. *Cliett v. Scott*, S.D. Tex., 1952, 103 F. Supp. 400. That judgment was affirmed by this Court. *Cliett v. Scott*, 1956, 233 F. 2d 269, certiorari denied 352 U.S. 917. That judgment is also attacked for fraud and mistake. Within the ten-year period the appellant had sued the Scott heirs in the Texas state courts seeking reimbursement for one-half of the cost of repairs and improvements and taxes paid upon the lands, alleging, however, that she did not "affirm or deny" the validity of the aforesaid judgment vesting in the Scott heirs an undivided interest in said lands. Also within the ten-year period the Scott heirs had answered, claiming to be the "owners of an undivided one-half interest in and to the lands etc." Conclusively this tolled the ten-year limitation period. *Beaumont Irrigation Co. v. Delaune*, Tex. 1915, 180 S.W. 98, 99; *Davis v. Morley*, Tex. Civ. App., 1943, 169 S.W. 2d 561, 567.

Finally, in 1958, the district court permanently enjoined the appellant from:

> "(c) filing or instituting or from causing to be filed or instituted any suit or judicial action against the Petitioners Mamie S. Hammonds, Reed Scott, Bertha Scott and Essie F. Scott individually and as Independent Executrix of the Will and Estate of Jeff Scott deceased, their tenants, heirs or assigns respecting or relating to said Petitioners, their heirs or assigns, title to or right of possession of said 349.755 acres of land hereinbefore particularly described."

That judgment was affirmed in a brief per curiam opinion by this Court. *Cliett v. Hammonds*, 1959, 265 F. 2d 933.

We pretermit the question of whether this motion was precluded by that injunction, and the further question of whether this motion was barred because it was not made until more than one year after the judgment as required for reasons (1), (2) and (3) under Rule 60(b). Instead, out of an abundance of caution, we have examined the motion on its merits and find that it was properly dismissed.

AFFIRMED.

Note:—The earlier opinions in this same case are shown in this Appendix at the following pages hereof, to-wit:

50, 53, 55 and 64.

JUDGMENT

Extract from the Minutes of January 13, 1961

IRENE SMITH CLIETT,

No. 18389 versus

MAMIE S. HAMMONDS, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Irene Smith Cliett, and the surety on the cost bond herein, The Travelers Indemnity Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

ORDER DENYING REHEARING

Extract from the Minutes of February 8th, 1961

IRENE SMITH CLIETT,

No. 18389 versus

MAMIE S. HAMMONDS, ET AL.

The petition for rehearing in the above-styled and numbered cause is hereby DENIED

ORDER DENYING SECOND AMENDED MOTION FOR RELIEF

Extract from the Minutes of February 16, 1961

IRENE SMITH CLIETT,

No. 18389 versus

MAMIE S. HAMMONDS, ET AL.

Leave to file in the district court the second amended motion for relief from judgment under Rule 60(b), Federal Rules of Civil Procedure, is hereby DENIED

SCOTT et al. v. SMITH

No. 7891

Circuit Court of Appeals, Fifth Circuit

June 22, 1936

Rehearing Denied July 25, 1936

Appeal from the District Court of the United States for the Southern District of Texas; Thomas M. Kennerly, Judge.

Suit by Flora Scott and others against Irene Smith. Judgment for defendant, and plaintiffs appeal.

Reversed and remanded.

H. Earl Cox and Alfred M. John, both of Houston, Tex., for appellants.

Larry W. Morris, of Houston, Tex., for appellee.

Before FOSTER, SIBLEY, and HUTCHESON, Circuit judges.

SIBLEY, Circuit Judges.

The plaintiff appellants are the heirs at law of George Scott, recently dead intestate, and they sue the defendant appellee, Irene Smith, asserting that six tracts of land in Texas to which she had the paper title had been purchased with money of Scott with resulting trust in his favor. A decree accordingly, with possession of the land and recovery of rents and revenues and general relief, is prayed. Irene Smith asserts that the lands were bought with her money and that no one else had any interest in them, and she prays that title be quieted in her and for general relief. The trial court found that there was a partnership between George Scott and Irene Smith beginning in 1926 under which they built a store on land standing in the name of George Scott (which land is not here in dispute) and conducted a profitable business until Scott's death in

1933. All money was kept in a deposit account in bank in the name of George Scott, but the checks of Irene Smith against it were also honored. In the absence of definite evidence on the point it is to be assumed that the partners were equally interested. The trial judge, who heard all the witnesses orally, including Irene Smith, thus rejected her claim and testimony that everything was hers, but found there was as stated a partnership with Scott. The evidence well sustains these findings. The judge further found that there were individual dealings of each in cattle which were not partnership matters, though the money to buy the cattle was all taken from the partnership bank account and the proceeds of cattle sold put back into that account. We think the evidence does not justify the conclusion that the cattle dealings were not also under the partnership, though transactions of purchase and sale occurred with one when the other was not present. All the cattle seem to have been branded alike with the letter S, which might stand for either Scott or Smith or both. All were pastured on the same land, that in dispute, and when sold the money got for all went back into the common account whence the purchase price had been taken. It appears to us that these activities also were partnership transactions and do not show any division of partnership profits or attempt thereat. The judge also found that the five tracts of land in dispute bought respectively in 1927, 1928, 1929, 1930, 1931, and 1932 were not partnership transactions but investments of the separate moneys of Irene Smith and therefore hers without any interest in or trust for Scott. This conclusion we find to be without support in the evidence. There is no doubt that every payment was made with money from the bank account standing in Scott's name, but really belonging to them both

as partners. Sometimes Scott made the trades, drew the checks, delivered them, and attended to the taking of the deeds and sometimes Irene Smith did. The papers were taken in her name and she signed the notes when any were given, but all the money that was paid was partnership money. Scott was an aging man nearing seventy and not in good health. He was separated from his wife. Irene Smith was much younger and in good health. He gave as the reason for having one tract put in her name that it would facilitate its transfer if he sold. He would not have to get his wife to join in a conveyance. At other times he said Irene Smith had worked hard and ought to have it. But neither pleading nor evidence is attempted of any gift from him; and in that case his wife's community rights would be in the way. There is no evidence that Scott had withdrawn in any way his share of the partnership moneys, and that what was put into the hands was Irene Smith's share. He and she and her young son all lived together as one household evidently all supported from the store. Scott is not shown to have had any sort of settlement of the partnership with Irene Smith. The bank's record of the entire account is in existence and in evidence and Irene Smith says she has many of the checks, but no effort is made to show any withdrawal by Scott for his own use. We could readily believe that Scott intended that Irene Smith should have the property in case of his death and not his abandoned family; but we do not think that in case of her death he intended that this Smith child should have everything and he in is old age nothing. But speculation as to intent aside, the fact is that partnership moneys have been laid out in lands in the name of one partner with no claim of a gift, and with no offsetting withdrawal by the other partner shown. We think equity can do no other than treat the partner who holds title as a

trustee for the partnership. It does appear that on the death of Scott that Irene Smith was not allowed to draw further at the bank and she qualified as Scott's administratrix to get the balance of about $300. Probably she has applied that or must apply it, as belonging to Scott; so that she may be entitled to an offsetting credit. It is also to be noted that the last purchased tract is heavily incumbered and the partnership equity in it is relatively small. There is no evidence as to the amount or disposition of the stock of merchandise in the store at Scott's death or the indebtedness of the business if any. The decree rendered in favor of Irene Smith cannot stand, nor on the present record should there be one for the plaintiffs. The lands are partnership assets, and the court ought first to ascertain and settle the affairs of the partnership. To this end the personal representative of George Scott should be made a party. The case should be reopened for further evidence as to the withdrawals of the partners, the debts, and the assets of the partnership besides the lands here in controversy. The proper disposition of the lands may thereby become more evident.

Accordingly, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

CLIETT et al. v. SCOTT et al.
No. 8835

Circuit Court of Appeals, Fifth Circuit
March 14, 1939

Appeal from the District Court of the United States for the Southern District of Texas; Robert T. Ervin, Judge.

Action by Flora Scott and others against Irene Smith, now Irene Smith Cliett, and others, to recover certain

lands in Waller County, Tex. From a judgment for plaintiffs, the defendants appeal.

Judgment affirmed.

Larry W. Morris, of Houston, Tex., for appellants.

H. Earl Cox, of Houston, Tex., and Fred P. Branson, of Muskogee, Okl., for appellees.

Before SIBLEY, HOLMES, and McCORD, Circuit Judges.

McCORD, Circuit Judge.

This action was originally instituted by Flora Scott and others, appellees, as heirs of George Scott, deceased, to recover certain lands in Waller County, Texas. The record title to said property was in Irene Smith, now Irene Smith Cliett, and the appellees contended that the lands had been purchased with the money of George Scott.

When this case was here before (Scott v. Smith, 5 Cir., 84 F. 2d 489), we sustained the finding of the trial court that a partnership existed between Irene Smith (now Irene Smith Cliett) and George Scott and held that in the absence of definite evidence on the point "it is to be assumed that the partners were equally interested".

In that case we said, "The lands are partnership assets, and the court ought first to ascertain and settle the affairs of the partnership. * * * The case should be reopened for further evidence as to the withdrawals of the partners, the debts, and the assets of the partnership beside the lands here in controversy. The proper disposition of the lands may thereby become more evident".

On the second trial of this case in the court below both parties declined to introduce additional evidence, and the cause was submitted for decision on the record made on the former trial. The court thereupon found the issues in favor of the appellees and awarded them one half of the lands in controversy.

[1, 2] Irene Smith Cliett was the surviving partner and the record shows that all information with reference to partnership assets and accounts were peculiarly within her knowledge. Being the surviving partner, the burden was upon her to make an accounting and show thereby, if she could, that her interest in the lands was greater than that presumed by law and declared in our former opinion. This she failed to do.

The decision of the trial court is in conformity with our former opinion.

The judgment is affirmed.

CLIETT et al. v. SCOTT et al.
Civ. A. No. 6088.

United States District Court
S. D. Texas, Houston Division
Feb. 19, 1952.

Sam G. Croom, of Houston, Tex., for plaintiffs.
W. H. Betts, of Hempstead, Tex., for defendants.
KENNERLY, Chief Judge.

This suit, filed in a State Court March 7, 1941, and removed into this Court April 13, 1951, involves certain lands in Waller County, in this District and Division. The parties to this suit, or those whose title they have, have heretofore been before this Court and an Appellate Court, litigating the title, etc. to such lands. See Scott v. Smith, 5 Cir., 84 F. 2d 489, and Cliett v. Scott, 5 Cir., 102 F. 2d 725. As a result of that litigation, Plaintiffs and Defendants by Judgment of this Court on March 14, 1938,[1] each

[1] The pertinent portion of such Judgment is as follows:
"That the plaintiff herein Mrs. Flora Scott, a widow, individually and as the Administratrix of the estate of Thomas Scott, deceased, and Minnie S. Hammonds, et al. (remainder illegible)

recovered an undivided one-half interest in and to such lands.

This suit having been originally filed in the State Court, various pleadings have been filed by the parties both in the State Court and in this Court. These are hereinafter more fully set forth. However, the case is now pending here on Plaintiffs' Third Amended Complaint, filed herein October 13, 1951. In such pleading, Plaintiffs seek to recover title to and possession of said lands in their entirety, but in the alternative Plaintiffs say that if Defendants own an undivided one-half interest therein, Plaintiffs have paid certain taxes, costs and expenses with respect thereto, and they sue for, and claim they are entitled to recover from Defendants, reimbursement therefor. Defendants deny that Plaintiffs own the entire title to such lands, but say that Plaintiffs and Defendants each own an undivided one-half thereof. They also deny that Plaintiffs are entitled to recover the taxes, costs and expenses sued for.

Defendants have moved for Summary Judgment, and this is a hearng of such Motion. The grounds upon which Defendants claim to be entitled to such Summary Judgment will be stated in the discussion.

1—Defendants say in their Motion for Summary Judgment that the Judgment of this Court of March 14, 1938, vested in Plaintiffs and Defendants each an undivided one-half interest in said land, and they plead such Judgment as

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Reed Scott, Jeff Scott and Bertha Scott are the owners and holders of a full undivided one-half interest in and to the following described land and premises situated in Wise County, Texas, to-wit:

(Here follows description of land by metes and bounds, title to which land stands in the name of Irene Smith or Irene Smith Cheit.

That it be and it is here now declared that the defendant herein Irene Smith Cheit holds the title to said undivided one-half interest in the land aforesaid in trust for the plaintiffs hereinabove named.

res adjudicata of any dispute now existing between the parties with respect to such title. It is perfectly plain that under such Judgment and the record as presented here, Plaintiffs and Defendants are each the owners of an undivided one-half interest in such lands, unless Plaintiffs have, as they claim, acquired title thereto under the Texas Ten Year Statute of Limitation.

2—Plaintiffs, as stated, claim such land, etc. under the Texas Ten Year Statute of Limitation.[2] Defendants say in reply that even though Plaintiffs have been in possession of said land (which, however, they deny) for the length of time prescribed by such Statute, Plaintiffs cannot recover under such Statute, because Plaintiffs' claim has been neither peaceable[3] nor adverse[4] within the meaning of such

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[2] Article 5510 of Vernon's Civil Statutes of Texas is as follows:

"Art. 5510. Ten years' possession

"Any person who has the right of action for the recovery of lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward. The peaceable and adverse possession contemplated in this article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements on the number of acres actually enclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be coextensive with the boundaries specified in such instrument."

Article 5514, defining peaceable possession, is as follows:

"Art. 5514. Peaceable possession

"Peaceable possession is such as is continuous and not interrupted by adverse suit to recover the estate."

Article 5515, defining adverse possession, is as follows:

"Art. 5515. Adverse possession

"Adverse possession is an actual and visible appropriation of the land, commenced and continued under a claim of title inconsistent with and hostile to the claim of another."

Statute. Or if it has been peacable or adverse, they say the facts show a tolling of such Statute for a sufficient length of time to prevent Plaintiffs from recovering thereunder.

[1] The Judgment of March 14, 1938, settles, as of that date, all questions of title, limitation, possession, or otherwise, between Plaintiffs and Defendants, and in order to recover, Plaintiffs must show full ten years *peacable* and *adverse* possession under such Statute *subsequent to that date*. This Record clearly shows that Plaintiffs have not done so and cannot do so.

[2] Whatever may be said with respect to Plaintiffs' possession between March 14, 1938, and March 7, 1941, it is perfectly plain that this Record shows that Plaintiffs' claim and possession of said land was not peaceable and adverse for full ten years subsequent to March 7, 1941. Particularly it was not peaceable and adverse from March 7, 1941, to September 29, 1947. Nor from September 29, 1947, to March 24, 1951. This was true for the following reasons:—

(a) On that date (March 7, 1941), not claiming such lands in their entirety, but moving on the theory that Plaintiffs and Defendants each owned an undivided one-half interest therein, Plaintiffs brought this suit against Defendants in the District Court of Waller County to recover from them monies claimed by Plaintiffs to have been expended for taxes, costs and expenses on the *whole* of such lands. They ask that the sum so paid out be declared to be a lien on such lands or Defendants' one-half thereof.

The Prayer in Plaintiffs' Petition is as follows:

"Wherefore, premises considered, plaintiff prays that the defendants herein be cited to appear and answer herein, and that upon a trial hereof [illegible]

(b) On September 29, 1947, Defendants filed in this suit in the District Court of Waller County their Answer to Plaintiffs' suit so filed on March 7, 1941, in which Defendants join issue with Plaintiffs as to Plaintiffs' right to recover such sums of money from Defendants, and by cross-action, sue Plaintiffs for the rents and profits of one-half of such lands during the period of time Plaintiffs had been in possession thereof.

(c) On October 17, 1947, by Supplemental Petition filed in said couse in the District Court of Waller County, Plaintiffs join issue with Defendants on Defendants' said Answer and Cross-Action, and pray that they be given

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the several payments and that an order be entered herein establishing a lien in favor of plaintiff against said several parcels of property for the costs of said improvements and repairs and (b) that plaintiff have judgment against the defendants and each of them for the several amounts paid by her when the deeds for the several parcels of property above described were obtained as well as the several balances of the purchase price of said parcels of property thereafter paid by her, together with 6% interest per annum thereon from date of the said several payments and further that it be decreed that she have a lien on said parcels of property for said several amounts and that in any event she be subrogated to the liens held and owned by the grantors of said property at the time said deeds were executed securing the purchase price of the same and (c) that she have a judgment against the defendants and each of them for the taxes paid by her in the amounts set forth in Exhibits A and B attached hereto and (d) that it be decreed that she have a lien on said parcels of property securing the payment of said several amounts paid as taxes thereon and in any event that [illegible] entered subrogating her to the lien of the State and County against said parcels of property for said taxes so paid by her and of said liens and any judgments entered be decreed to be prior to any right, title or interest of the defendants in and to said parcels of property or any of them and further that plaintiff recover of them and for such other and further relief special and general in law or equity to which she may be justly entitled."

Judgment against Defendants as set forth in their Original Petition filed March 7, 1941.[6]

(d) On March 24, 1951 Plaintiffs filed in said cause in the District Court of Waller County their Amended Petition, in which they claim to own the whole of such lands and seek to recover same in their entirety. But in the alternative they still seek to recover for monies expended thereon as set forth in their former pleadings.

In other words, Plaintiffs are claiming to have matured title by limitation to the whole of such lands while they were at the same time conceding in their pleadings in this case in the State Court that Defendants owned one-half thereof, and were seeking to recover from Defendants part of the expenditures alleged to have been made by Plaintiffs for the benefit of the whole title. This, under the Texas authorities, they may not do.

[3-5.] To cite all the cases would be such a large task that I quote the language of the Supreme Court of Texas from one of the earlier Texas decisions, Word v. Drouthett, 44 Tex. 365, 369 (italics mine): "The possession must be exclusive, or, as it is generally expressed, it must be actual, continued, visible, notorious, distinct, and hostile." (2 Smith's Lead. Cases, 561, et seq.) It must neither be abandoned, yielded up, or held in subordination to, recognition of, or dependent upon the will or right of another. He who would claim by reason of his adverse possession must,

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[6] The Prayer of Plaintiffs in such Supplemental pleading is as follows:—

"Wherefore, having answered fully to the defendants' cross action, and all parties being before the Court, plaintiffs pray that the defendants take nothing by their cross action and that these plaintiffs go hence without day as to said cross action, that they further recover judgment against these defendants as prayed for in their original petition and for all costs of suit and for general relief."

as has been said, *'keep his flag flying.'* [Stephens v. Leach, 19 Pa. 262], 265). His entry upon the land must be with intent to claim it as his own or hold it for himself; or his intention to do so, if conceived after going into possession for some other purpose, must be manifested by some open or visible act or declaration showing such purpose, in order to set the statute in motion in his favor. (Wash. on Real Prop. 125; 2 Smith's Lead. Cases, 561). *The possession must be fair and open, because 'the statute was not made to serve the purpose of artifice and trick.'* (Sailer v. Hertzogg, 2 Pa. 182, 185)."

[6] And I quote from one of the most recent cases, Delany v. Patterson Padgett, et al., 5 Cir., 193 F.2d 806, 810, where in discussing adverse possession under the Texas Statutes of Limitation, it is said (italics mine):

"These same authorities do, though, make it perfectly clear that the claim of right referred to in the statutes means a bold and open, a downright and persistent claim asserted not furtively by stealth and artifice, but openly, notoriously, unequivocally, adversely and continuously. Because this is so, the decisions under these statutes take pains to leave in no doubt that if there is any break or chink in the armor of proof which a possessor must put and keep on when he undertakes to acquire a title by limitation, *such as a single lisp of acknowledgement*, the slightest uncertainty or equivocation in the openness and downrightness of his claim, a failure to comply precisely and exactly with the statutory provision, it is, and will be, fatal to the claim."

The pleadings of Plaintiffs filed herein as stated are more than *"lisps of acknowledgement"*. They are plain declarations and admissions that Defendants owned an undivided one-half interest in the land. See Warren v. Frederichs, 83

Tex. 380, 384, 18 S.W. 750. Houston Oil Co. of Texas v. Pullen, Tex.Com.App., 272 S.W. 439, 440, where it is said:

"There are various ways by which the title of another may be recognized. For instance, as stated by counsel in the application for writ of error:

"'(1) By agreement to hold under another. Burrell v. Adams, 104 Tex. 183, 135 S.W. 1156; Weisman v. Thompson, Tex.Civ.App., 78 S.W. 728. (2) By the taking or offering to take a lease. Gillean v. Frost, 25 Tex.Civ.App. 371, 61 S.W. 345. (3) By an offer to buy when it involves an admission of title. Mhoon v. Cain, 77 Tex.[316] 317, 14 S.W. 24; Texas & N.O. R. Co. v. Speights, 94 Tex. 350, 60 S.W. 659; Schleicher v. Gatlin, 85 Tex. 270, 20 S.W. 121; Chapman v. Dickerson, Tex. Civ. App., 223 S.W. 318. (4) By a promise to pay rent for the use of the land. Gordon v. Gordon, Tex. Civ. App., 224 S.W. 716. (5) By an admission that he claims no title. Warren v. Frederichs, 83 Tex. [380] 384, 18 S.W. 750; McDonald v. McCrabb, 47 Tex. Civ. App. 259, 105 S.W. 238. (6) By an admission of title in another. Texas West R. Co. v. Wilson, 83 Tex. [153] 157, 18 S.W. 325; Beal v. Earhart, Tex. Civ. App. 249 S.W. 1093; Thomson v. Richardson, Tex. Com. App., 221 S.W. 952; Satterwhite v. Rosser, 61 Tex. 166; Whitaker v. Thayer, 38 Tex. Civ. App. 537, 86 S.W. 364; Gillean v. Frost, 25 Tex. Civ. App. 371, 61 S.W. [345] 347; Texas & N. O. R. Co. v. Speights, 94 Tex. 350, 60 S.W. 659; Mass v. Bromberg, 28 Tex. Civ. App. 145, 66 S.W. 468. (7) And in various other ways, Corpus Juris, Vol. 2, p. 103, par. 142; Collins v. Megason, Tex. Civ. App. 228 S.W. [583] 585." See also Brocks v. Phelps, Tex. Civ. App., 285 S.W. 904. Doherty v. Jensen, Tex. Civ. App., 174 S.W. 2d 77.

[7] But where, as here, the parties are Tenants in Common, the limitation claimant has a greater burden. Stiles

v. Hawkins, Tex. Com. App., 207 S.W. 89, 95. House v. Williams, 16 Tex. Civ. App. 122, 40 S.W. 414. Liddell v. Gordon, Tex. Com. App. 294 SW. 1098, 1099. Terry v. Terry, Tex. Civ. App., 228 S.W. 299.

It is clear that Plaintiffs have not acquired title to the entire property under the Texas Ten Year Statute of Limitation.

[8] 3—Plaintiffs in their Third Amended Petition filed herein are seeking to recover expenditures alleged to have been made by them on such lands prior to March 14, 1938, the date of the Judgment of this Court hereinbefore referred to. The pleadings upon which such Judgment was entered, when looked to, show that Mrs. Flora Scott, et al. (Defendants herein but Plaintiffs there) were seeking to recover from Irene Smith (Plaintiff herein but Defendant there) the lands involved in this suit, upon the claim that she (Irene Smith) held same in trust for them. She (Irene Smith) was called upon in said suit to account to Scott, et al for such rents, revenues, and other gains and profits which she had received and collected on account of such lands. Irene Smith answered, denying that she held such lands, or any part thereof, in trust for Scott, et al., and claimed that she herself owned them, and prayed Judgment therefor. She also prayed that she be decreed to be entitled to all rents and revenues, etc. derived in the past or in the future from said lands, etc. While the Judgment of March 14, 1938, does not in so many words dispose of these claims for money asserted by the parties, I think the legal effect thereof was to do so, and that Plaintiffs may not recover here any sums of money expended by them on said lands, etc. prior to March 14, 1938.

4—From what has been said, it follows that Defendants' Motion for Summary Judgment should be sustained

and that Defendants are entitled to Judgment here for an undivided one-half interest in such lands. Also that Plaintiffs take nothing for expenditures claimed to have been made by them on such lands prior to March 14, 1938.

In view of the foregoing ruling, there is only left in the case for determination by the Court an accounting between Plaintiffs and Defendants as Tenants in Common since March 14, 1938. The Court will, as soon as conveniently possible, hold a Pre-Trial Hearing with respect to such remaining matters, to the end that they may be quickly tried and disposed of.

Irene Smith CLIETT and J. M. Cliett,
Appellants and Appellees,

v.

Jeff SCOTT, Reed Scott, Bertha Scott, and
Mamie S. Hammonds, Appellees
and Appellants.

Jeff SCOTT, Reed Scott, Bertha Scott, and
Mamie S. Hammonds, Appellees
and Appellants,

v.

Irene Smith CLIETT and J. M. Cliett,
Appellants and Appellees.

No. 15834.

United States Court of Appeals
Fifth Circuit.

May 15, 1956.
Rehearing Denied June 26, 1956.

Sam G. Croom, Houston, Tex., for appellants.

W. H. Betts, Hempstead, Tex., for appellees.

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges.

HUTCHESON, Chief Judge.

Begun in the District Court of Waller County, Texas, on March 7, 1941 the suit had for its object the recovery, from the defendants, all non-residents of the State of Texas, of moneys paid by the plaintiff, Irene Smith Cliett, on account of the property described in the petition, consisting of about 700 acres of land.

Based upon a judgment, declaring that plaintiffs and defendants were joint owners of the property, rendered on March 14, 1938, by the United States District Court for the Southern District of Texas, and affirmed by this court in March, 1939, Cliett v. Scott, 102 F. 2d 725, the suit sought a judgment for the amounts claimed and a lien upon defendants' half interest in the property to secure their payment.

On September 29, 1947, over six years after the suit was filed, the defendants filed an answer to plaintiffs' suit, denying their claims and a counterclaim which, acknowledging that the property was jointly owned, sought an accounting from plaintiffs for amounts due to them by plaintiffs for the use and occupation of the property.

On March 24, 1951, the plaintiffs filed a first amended petition. In and by it they sued in trespass to try title, claiming title by limitation to all the property in controversy, and in the alternative, only, reasserting their original claim for a money recovery.

Thereupon defendants filed their petition for removal, and the suit was removed into the United States District Court for the Southern District of Texas, the court in which the rights of the parties in the land had been earlier declared and established.

On April 24, 1951, plaintiffs filed their motion to remand on the ground that the defendants had voluntarily

submitted to the jurisdiction of the state court and had lost their right to remove.

The district court, pointing out in a memorandum opinion that, though, by appearing and answering the original petition, the defendants did submit themselves to jurisdiction of the state court with respect to the claim asserted therein, the amended petition set up an entirely new and completely different claim, and defendants then became and were entitled to remove.

On Dec. 5, 1951, defendants filed a motion for summary judgment, and after being fully heard and argued, the motion was sustained and judgment entered for defendants as to the claim of plaintiffs that they had acquired title by limitation to the whole of the land.

In a carefully written and correctly argued opinion, the district judge took note of the previous litigation in the federal court, Scott v. Smith, 5 Cir., 84 F. 2d 489 and Cliett v. Scott, 5 Cir., 102 F. 2d 725, which had ended in a judgment vesting title in plaintiffs and defendants, one-half in each, and that, on March 7, 1941, plaintiffs, not claiming the lands as their own but as jointly owned with defendants, had filed, and for ten years had maintained, a suit for an accounting for moneys claimed to have been expended in the joint interest of the co-owners with a lien to be fixed on defendant's one-half interest in the land. Holding under Texas law, established in the host of cases cited by him, beginning with Word v. Drouthett, 44 Tex. 365, 369, and concluding with Delaney v. Padgett, 5 Cir., 193 F. 2d 806, 807, that by thus admitting ownership of a half interest with the defendants in the land plaintiffs were prevented from claiming that they had held the land adversely, he correctly held that the plaintiffs had not in the ten year period claimed by them acquired a limitation title against the defendants.

Entering judgment accordingly, he reserved for further action the claims of the respective parties against each other for an accounting growing out of the use and possession of, and the improvements made and moneys expended, on and in respect of the land.

Thereafter, a full accounting having been had, the district judge, canvassing the respective contentions of the parties and fully appraising them, found and concluded that sums were due from each to each in amounts which in effect offset each other, and that neither plaintiffs nor defendants were entitled to a money judgment against the other. So concluding, he ordered a partition of the property, appointed commissioners to effect it, and taxed the costs one-half against each.

Appealing from the judgment, plaintiffs are here urging upon us that the decree must be reversed because it was error (1) not to remand the cause to the state court; (2) to determine on summary judgment and as matter of law that plaintiffs had not perfected title by limitation; and (3) to find in effect that the claims due plaintiffs by defendants were offset by the claims due defendants by plaintiffs.

On their part, defendants are here insisting that the judgment should be affirmed, except on their cross-appeal which alleges error in the accounting and seeks an affirmative judgment in their favor.

[1] On the issue of remand, appellants' reliance is placed wholly in the fact that the removal statute, Sec. 1441, Title 28 U.S.C., accords the right to remove to defendants only, and the claim that defendants, having not only submitted to the jurisdiction of the state court but having invoked its jurisdiction by becoming cross-plaintiffs ceased to be defendants and became in effect plaintiffs.

The appellees' position is, and that of the district judge was, that while defendants did consent to the jurisdiction of the state court over the claim for accounting filed by plaintiffs, and did file a counter claim, either permissive or compulsory, this did not change or affect their status as defendants, and under settled law, when plaintiffs filed an entirely new and different suit, defendants' right to remove revived.

We think it clear that the position of appellee and the district judge is the correct one. While there is some confusion in the authorities as to the effect on removal of the filing of a cross action,[1] it is well settled that a claim of the kind filed in this case by the defendants against the original plaintiffs was not such an independent suit as to affect the right to remove, and the authorities are overwhelming that, though a defendant has submitted himself to state court jurisdiction on one cause of action, this does not prevent his removing the cause when an entirely new and different cause of action[2] is filed.

[2] On the other issues raised, little need be said. We find ourselves in full agreement with the district judge on the issue of limitation. Indeed, we think it is too clear on principle and on authority to admit of discussion that plaintiffs cannot after formally admitting in their pleadings filed in court that the defendants are cotenants with them, later claim that during the period that such pleadings were on file their claim was adverse.

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1 45 Am.Jur., "Removal" Sec. 15, p. 817; Habermel v. Mont... Cir., 31 F.2d 822, 67 A.L.R. 216. Cf. Chicago, R. I. & P. R. Co. v. Stude, 346 U.S. 574, 74 S.Ct. 290, 98 L.Ed. 317.

2 Evans v. Dillingham, C.C., 48 F. 177; Mattoon v. Reynolds, C.C., 62 F. 417; Henderson v. Midwest Refining Co., 10 Cir., 84 F.2d 23, 25; Baron v. Brown, D.C., 83 F.Supp. 520.

[3] When finally we come to the judgment on accounting, with which both plaintiffs and defendants disagree, we think it clear: that the matters considered and determined, with their countervailing equities, were matters of equitable cognizance which, under the facts in this case, including the long prior litigation, the chancellor was peculiarly fitted to assay and determine; and that his conclusion, to leave the parties where the decision of the federal court in 1938 had left them, as co-tenants and as having completely offsetting rights against each other, was a wise and sound conclusion and should not be disturbed.

The judgment is, therefore, affirmed.

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